Supreme Court, U. S.
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No. 78-831

In the Supreme Court of the United States

OCTOBER TERM, 1978

NEIL A. RINGQUIST, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 582 F. 2d 1138. The opinion of the district court (Pet. App. 1b-6b) is not reported. The opinion of the Civil Service Commission (Pet. App. 1c-14c) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1978. The petition for a writ of certiorari was filed on November 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The Civil Service Commission, whose chairman was named as respondent, has been abolished by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 91 Stat. 1111. The functions relevant to this case have been assumed by the Merit Systems Protection Board effective January 1, 1979.

QUESTION PRESENTED

Whether petitioner was properly discharged from his federal employment.

STATEMENT

Petitioner, formerly a tax auditor for the Internal Revenue Service, received notice on June 30, 1975, of a proposal to fire him. The notice stated that on 17 individual tax returns petitioner had described as verified or substantiated claims of deductions for which no documentation or inadequate documentation existed (Pet. App. 2a). All 17 returns had been completed by Mildred Winkels, a tax preparer known by petitioner to be under IRS investigation for suspected exaggerated deductions and fraudulent returns (Pet. App. 1b-2b, 3c).

Petitioner was offered an opportunity to review the material supporting the charges and to respond in writing (Pet. App. 4c). The acting District Director of IRS sustained 14 of the 17 specifications and considered the remaining three specifications to be dismissed. On September 22, 1975, petitioner was removed from IRS employment as of October 10, 1975 (Pet. App. 5c).

Petitioner appealed to the Appeals Authority of the Civil Service Commission. The Appeals Authority received testimony from IRS employees about accepted auditing practices, and it also received affidavits from 17 taxpayers, who stated that they could not substantiate the deductible items that petitioner had verified in his audit (Pet. App. 5b). Petitioner did not controvert the accuracy of the affidavits; he argued, instead, that his "verification" derived from the word of the tax preparer (Pet. App. 5b, 7c-11c).

The Appeals Authority upheld the dismissal, and the Civil Service Commission Review Board declined to exercise discretionary review. Petitioner then brought this suit, seeking reinstatement and back pay (Pet. App. 2a, 2b). The district court granted summary judgment for the government, holding that petitioner had received due notice and a hearing that was proper under applicable regulations; the court also held that these procedures satisfied due process standards. The court found that petitioner's dismissal was supported both by a rational basis and by substantial evidence (Pet. App. 3b, 5b, 6b).

The court of appeals first held (Pet. App. 2a-4a) that a discharge properly should be reviewed to guard against arbitrary and capricious action but not to look for substantial evidence. The substantial evidence rule, the court held, applies only to actions taken after full hearings on the record. The Civil Service statutes, the court said, do not require such hearings, and 5 U.S.C. 554(a)(2) demonstrates the inappropriateness of the substantial evidence standard in such cases. The court then concluded that the procedures followed in petitioner's hearing did not violate the Due Process Clause because the Constitution does not invariably require that all evidence be presented by live witnesses (Pet. App. 4a-8a). Finally, the court held that there was ample evidence to support the discharge (*id.* at 8a-9a).

ARGUMENT

1. Petitioner first contends that his hearing violates the Due Process Clause (Pet. 8-13). His argument is that the Clause forbids the introduction of evidence by affidavits.[2]

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[2]Petitioner also argues that he was deprived of his right to counsel. He did not elaborate on this claim in the court of appeals, and his petition does not state how the alleged deprivation occurred. Federal employees are entitled by regulation to the assistance of counsel in such hearings. 5 C.F.R. 772.307. Petitioner's further argument that he was denied access to an unspecified IRS investigation report and hindered in his attempt to obtain the names of affiants does not afford any ground for relief. Petitioner does not show—or even argue—that these things were material to his defense, or that they would have been helpful if obtained. See *Moore* v. *Administrator, Veterans Administration*, 475 F. 2d 1283, 1285 (D.C. Cir. 1973).

Petitioner's case was handled in accordance with the applicable regulations. Under 5 C.F.R. Part 752B, petitioner had a right to advance written notice of the proposed adverse action, including a detailed statement of specifications and reasons; a right to review the material underlying the charges; a right to reply in writing (and to submit evidence); and a right to appeal to the Civil Service Commission. Under 5 C.F.R. 772.307 the Commission's hearing offered petitioner a full opportunity to present evidence. Petitioner could appear personally and by a representative, introduce witnesses, cross-examine adverse witnesses, and obtain a transcript of the proceedings. Because the Commission does not have the authority to compel the presence of persons who are not federal employees, however, some evidence in such hearings may be introduced by affidavit. 5 C.F.R. 772.307(c)(2).

Petitioner had a right to a full oral hearing. Indeed, the procedures followed here were more thorough than those that this Court held, in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), to be sufficient for the dismissal of a federal employee. Although some evidence was presented by affidavit in this case, the Due Process Clause does not forbid this practice. See *Richardson* v. *Perales*, 402 U.S. 389 (1971). The use of affidavits was not constitutional error where, as here, the information in the affidavits was undisputed; petitioner's defense accepted the truth of the affiants' statements that they had not supplied proof of the claimed deductions, and petitioner argued only that the "verification" of the deductions had been supplied by the person who prepared the 17 tax returns (Pet. App. 7c-13c). The use of affidavits rather than live witnesses thus had no bearing on the case (Pet. App. 6a-7a).[3]

[3]Petitioner asserts that a number of cases conflict with the decision of the court of appeals here. But the court of appeals accurately distinguished these cases (Pet. App. 7a) for the reasons given in the

2. The court of appeals upheld the trial court's finding that petitioner's discharge is supported both by a rational basis and by substantial evidence (Pet. App. 4a n.2, 8a-9a, 6b). The court found the lesser standard of review appropriate (Pet. App. 2a-4a). But because there has been a finding that the discharge was supported by substantial evidence, there is no need for this Court to consider which of the standards of review is the right one. Some courts have applied the substantial evidence standard to employee discharge cases without discussion,[4] and the issue may require review in a future case, but it is not presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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text. Moreover, we doubt that the cases on which petitioner relies survived *Arnett* v. *Kennedy* and subsequent due process cases. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). There is no reason for this Court to review the subject in advance of an indication that other courts will adhere after *Eldridge* to a rigid view that the Constitution always forbids the introduction of evidence by affidavit in employee discharge cases.

[4]The courts have used different standards of review of agency discharges without articulating the basis for their choice. See, *e.g.*, *Charlton* v. *United States*, 412 F. 2d 390, 395 (3d Cir. 1969); *Halsey* v. *Nitze*, 390 F. 2d 142, 144 (4th Cir.), cert. denied, 392 U.S. 939 (1968); *Meehan* v. *Macy*, 392 F. 2d 822, 830, 837 (D.C. Cir. 1968); *Taylor* v. *United States Civil Service Commission*, 374 F. 2d 466, 470 (9th Cir. 1967).

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